

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 288 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT

Versus

ABTHARHUSSAIN H KHATRI AND OTHERS

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Appearance:

Mr. M.A.Bukhari, A.P.P. for the appellant.

Mr. K.I.Kadiafor respondents no.1,2 & 5 to 12.

Appeal abated against respondents no.3 & 4.

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CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 21/08/96

ORAL JUDGEMENT : (Per : Panchal,J.) :-

By means of filing this appeal under section 378 of the Code of Criminal Procedure, 1973, the State of Gujarat has questioned legality and validity of the

judgment and order dated January 17,1985 delivered in Sessions Case no.132/84, by the learned Additional Sessions Judge, Vadodara, acquitting the respondents under sections 302, 147, 148, 149, 323, 324, 427, 452, 393 and 436 of the Indian Penal Code.

2. The prosecution case in brief is that three months prior to the date of incident which is June 9,1994, complainant Amarsing had molested daughter of deceased Maulvi Abdul Rasid, as a result of which a quarrel had taken place between the family members of the complainant Amarsing on one hand and family members of deceased Mulvi Abdul Rasid on the other hand. Because of this incident cross complaints were filed and were pending for trial in competent court. According to the prosecution, father of the complainant had sent the complainant on tour. The complainant returned to village Dabhoi on June 8,1984. On June 8,1984, complainant Amarsing and his maternal uncle Udesinh were accosted by accused no.2 when they were returning after having tea in a Hotel situated on Tilakwada road. The prosecution has alleged that accused no.2 told the complainant Amarsing that he had concealed himself for a pretty long time, but now he would not be spared. Thereupon the complainant asked the accused no.2 to do his worst. Thereafter at about 3.15 p.m. a mob consisting of 50 persons came near the house of Pratapsinh, who is father of complainant Amarsing. The case of the prosecution is that the respondents were members of the mob. Respondents no.1 & 2 were armed with sticks; whereas respondent no.7 had sword with him. According to the prosecution, accused no.1 gave stick blow on the head of complainant Amarsing as a result of which he sustained injuries. Other members of the mob also assaulted family members of the complainant and because of this Gyan Kaur, Hajursing, Indra Kaur etc. received injuries. The case of the prosecution is that thereafter the mob set the house of the complainant on fire and committed loot of household articles. The prosecution has alleged that deceased Pratapsing, father of the complainant had gone to market and when he was returning home, members of the mob assaulted him, as a result of which, he died. The complainant went to the police station and lodged complaint at about 6.45 p.m. After entering the complaint in the register kept at the police station, senior P.S.I. Mr. Patel started investigation. He held inquest on the dead body of Pratapsing and sent it for postmortem. Autopsy on dead body was performed by Dr.Shrimali of Referral Hospital, Dabhoi. Further investigation into the case was thereafter handed over to

Circle Police Inspector Mr.Raol, who recorded statements of witnesses and also got prepared panchnama of scene of offence. The investigating officer arrested some of the accused on June 10,1984 and rest of them on June 11,1984. At the conclusion of investigation, the accused were chargesheeted under sections 302, 147,148, 149, 323, 324, 427, 452, 393 and 436 of the Indian Penal Code. As the offence under section 302 of I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court for trial.

3. The learned Additional Sessions Judge, Vadodara framed charge at Exh.1 against the accused under sections 302, 147, 148, 149, 323, 324, 427, 452, 393 and 436 of the Indian Penal Code. The charge was read over and explained to the accused. The accused did not plead guilty to the charge and claimed to be tried. The prosecution, therefore, examined following witnesses to prove its case against the accused :-

- (1) Sumanlal Bholanath, PW.1, Exh.47
- (2) Pravinaben Madlani, P.W.2, Exh.54
- (3) Amarsing Pratapsing, PW.3, Exh.56
- (4) Mahendrasing Pratapsing,PW.4, Exh.58
- (5) Hajursing Harnamsing, PW.5, Exh.59
- (6) Gyan Kaur Pratapsing, PW.6, Exh.60
- (7) Vijaykumar Babubhai, PW.7, Exh.61
- (8) Babubhai Ishwardas,PW.8, Exh.73
- (9) Bhikhabhai Ramabhai, PW.9, Exh.74
- (10) Pravinsinh Chhatrasing, PW.10, Exh.75.

The prosecution also relied on documentary evidence, such as, postmortem notes of deceased Pratapsing, complaint filed by Amarsing, panchnama of scene of offence, injury certificates of injured witnesses etc. to prove its case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the accused generally on the case and recorded their statements under section 313 of the Code of Criminal Procedure. In their statement under section 313 the accused pleaded that they were subjected to assault by complainant and others in which Maulavi Abdul Rasid died and some of the accused persons received injuries. In their statements under section 313 of the Code it was claimed that the case of the prosecution against them was false. However, the accused did not lead any evidence in defence.

5. After appreciating the evidence led by the prosecution and hearing the parties, the learned Judge recorded following conclusions :-

- (1) The evidence of medical officer Mr. Shrimali read with postmortem notes indicate that the deceased Pratapsing died a homicidal death.
- (2) The evidence of Dr. Shrimali read with the injury certificates issued by him prove beyond reasonable doubt that witness Amarsing, Hajursing, Mahendrasing, Indra Kaur, Gyan Kaur and Dhan Kaur had also received injuries.
- (3) The evidence of investigating officer shows that Yusuf Bodivala had filed complaint against Amarsing and others regarding homicidal death of Maulavi Abdul Rasid and injuries to the accused.
- (4) Though witness Amarsing, Mahendrasing and Hajursing had stated that accused no.1 had given blow by means of sticks on head of the complainant Amarsing, medical evidence contradicts them.
- (5) The incident took place at 3.00 p.m. on June 9, 1984, but the complaint was lodged with the police station at 6.45 p.m. and no explanation worth the name is offered by any of the prosecution witnesses for late filing of the complaint.
- (6) The witnesses belong to the same family and are interested witnesses. There are major contradictions in their evidence and as prosecution has not examined any independent witness, the evidence of prosecution witnesses cannot be relied on.
- (7) The medical evidence on record proves it beyond reasonable doubt that the accused nos.1, 3, 4 & 5 had received serious injuries in the incident, but the prosecution witnesses have not offered any explanation regarding their injuries and, therefore, the case of prosecution becomes doubtful in view of the law propounded by the Supreme Court in the case of LAKSHMI SING AND OTHERS vs. STATE OF BIHAR, A.I.R. 1976 S.C. 2263.
- (8) The prosecution has failed to prove the case against the accused beyond reasonable doubt.

In view of the above referred to conclusions, the learned Additional Sessions Judge acquitted the accused by the impugned judgment and order, giving rise to the present appeal.

6. It may be stated that the case against original accused nos.3 & 4 abated, as they died during trial after charge was framed by the learned Additional Sessions Judge.

7. The acquittal appeal was placed before the Court (Coram: G.T.Nanavati,J. as he then was and B.S.Kapadia,J.) for admission hearing on July 11,1985. After hearing the Counsel for the State Government, following order was passed :-

"Leave granted and appeal admitted as regards respondents nos.1,2 and 5 to 12. Bailable warrants in the sum of Rs.3000/- each to be issued against them. Leave refused as regards the other respondents i.e. respondents nos.13 to 19"

8. Mr. M.A.Bukhari, learned Counsel appearing for the State Government has taken us through the entire evidence on record. On behalf of the State Government it was pleaded that the evidence on record proves it beyond shadow of doubt that the respondents against whom the appeal is admitted, were members of an unlawful assembly and had belaboured not only the complainant and others, but had also caused death of deceased Pratapsing and, therefore, the impugned judgment deserves to be set aside. It was claimed that the evidence of injured witnesses is not only corroborated by each other, but is also corroborated in material particulars by medical evidence on record and, therefore, the learned Judge committed material error in disbelieving the prosecution case. What was emphasised on behalf of the appellant was that the respondents were aggressors and, therefore, non-explanation of the injuries by prosecution witnesses should not have been attached undue importance. Learned Counsel for the State Government pleaded that the case of the prosecution is proved against the respondents beyond reasonable doubt and, therefore, the appeal should be allowed.

9. Mr. K.I.Kadia, learned Counsel for the respondents argued that the prosecution witnesses belong to one family and are highly interested and, therefore, the learned Judge cannot be said to have been committed any error in brushing aside their evidence, more particularly in absence of any corroboration from independent source. Learned Counsel for the respondents stressed that in fact the complainant and others had mounted attack on the respondents as a result of which Maulavi Abdul Rasid died and four respondents received

serious injuries, which indicates that the complainant and others were aggressors and not the respondents. The learned Counsel further emphasised that four respondents had received serious injuries in the incident, but neither in the complaint nor in the evidence any explanation was sought to be offered regarding injuries sustained by the accused and thus, prosecution having suppressed genesis of the occurrence, whole case of the prosecution becomes doubtful. Learned Counsel asserted that cogent and convincing reasons have been given by the learned Trial Judge while acquitting the respondents and the same should not be interfered with by the Court in acquittal appeal, more particularly when two views of the matter are possible.

10. The fact that deceased Pratapsing died a homicidal death, is not in dispute. That is amply proved by the prosecution through the evidence of Dr. Shrimali and postmortem notes prepared by him. Similarly, the fact that complainant Amarsing and injured eye witnesses Hajursing, Mahendrasing, Gyan Kaur, Indra Kaur and Dhan Kaur received injuries stated in the certificates issued by Dr. Shrimali is also proved beyond pale of doubt. However, the question which arises for consideration of the Court is whether the prosecution has proved it beyond reasonable doubt that the respondentss collectively or any of the respondents was responsible for the death of deceased Pratapsing and/or injuries caused to the injured witnesses. In order to prove the case of murder, prosecution had sought reliance on the evidence of Dr. Vijaykumar Babubhai and Bhikhabhai Ramabhai. However, as noted by the learned Additional Sessions Judge, both of them have not supported the prosecution. It is true that they were declared hostile with the permission of the Court and contradicted with their police statements. However, the fact remains that they have not supported the prosecution case. With regard to the evidence of hostile witness, law is well settled. The evidence of a hostile witness can be relied on provided it is corroborated in material particulars by other reliable independent evidence on record. On close scrutiny of the record, we find that there is no independent reliable evidence on record which corroborates the hostile witnesses. Therefore, the prosecution has failed to prove that the respondents or any of them committed murder of deceased Pratapsing.

11. Though the injured witnesses have stated that the accused no.1 had given blow with stick on head of complainant Amarsing, all of them stand contradicted when

medical evidence is perused. The medical evidence does not indicate that any injury on head was sustained by the complainant Amarsing. It would not be out of place to notice that material prosecution witnesses belong to the same family and are highly interested. The learned Judge has rightly noted that their evidence does not get corroboration from independent evidence. It is also relevant to note that the incident had taken place at 3.00 p.m., but the F.I.R. was lodged by complainant Amarsing at 6.45 p.m. No explanation worth the name has been offered by any of the prosecution witnesses regarding late filing of the complaint. As the witnesses have tendency to exaggerate, it would not be safe to rely on their evidence more particularly when the complaint seems to have been filed after deliberation. Complainant Amarsing and witness Mahendrasing have stated in their evidence that there was only one mob; whereas injured Hajursing and Gyan Kaur have stated that two mobs had come to the place of occurrence from different directions. The learned Additional Sessions Judge, who had advantage of observing demeanour of the witnesses has noted major contradictions appearing in the evidence of prosecution witnesses. The complaint filed by Yusuf Bodiwala is referred to in detail by the investigating officer. The evidence of investigating officer shows that the respondents and others were also assaulted by complainant Amarsing and others as a result of which, Maulavi Abdul Rasid died and four of the respondents sustained serious injuries. Under the circumstances, the defence pleaded by the respondents in their statements under section 313 of the Code is probablised.

12. The most relevant feature of the case is that the prosecution witnesses have not explained the serious injuries sustained by four accused, The injuries sustained by respondents nos.1,3,4 & 5 have been described by medical officer Mr. Shrimali in detail. A bare look at the injury certificates makes it abundantly clear that all of them had sustained bleeding injuries by sharp cutting instruments. At the time of arrest of the accused, panchnama of their persons were prepared, wherein also injuries are noted. The prosecution witnesses have not offered any explanation regarding injuries sustained by the accused or as to how Maulavi Abdul Rasid died. Under the circumstances, no exception can be made when the learned Judge applied the principle laid down by the Supreme Court in the case of LAKSHMI SING (supra) to the facts of the present case. In the said case, the Supreme Court has clearly enunciated that in a murder case, non-explanation of injuries sustained by the accused at about the time of the occurrence or in

the course of altercation, is a very important circumstance from which the Court can draw the following inferences:-

(i) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus, not presented the true version, (ii) that the witnesses, who have denied the presence of the injuries on the person of the accused, are lying on a most material point and, therefore, their evidence is unreliable, and (iii) that in case there is a defence version which explains the injuries on the person of the accused, it is rendered probable so as to throw doubt on the prosecution case.

The Supreme Court has also emphasised that omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

13. As noted earlier, none of the prosecution witnesses has offered any explanation regarding any injury sustained by the accused. On the facts and in the circumstances of the case, we are of the opinion that the learned Judge was justified in recording the finding that the prosecution has suppressed the genesis of the occurrence and has not presented true version of the incident. The omission on the part of the prosecution to explain injuries on the person of the accused assumes greater importance in this case because the evidence as observed earlier consists of interested and inimical witnesses and also because the defence version competes in probability with that of the prosecution one. In our view, acquittal of the respondents is based on cogent reasons and no ground is made out by the learned Counsel for the appellant to interfere with the same in the present appeal.

14. This is an acquittal appeal in which court should be slow to interfere with the order of acquittal. The infirmities in the prosecution case go to the root of the matter and strike a fatal blow to the prosecution case. In such a case it would not be safe to set aside the order of acquittal relying on the oral evidence of witnesses, particularly when the evidence has not inspired confidence of learned Trial Judge who had opportunity to mark demeanour of witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary to either reiterate the evidence of prosecution witnesses or to restate the



reasons for acquittal given by the Trial Court, and in our view, the expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi vs. Bigendra Chaudhari, A.I.R.1967 S.C. 1124, and (2) State of Karnataka vs. Hema Reddy and Another, A.I.R. 1981 S.C. 1417. On overall appreciation of the evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to one already taken by the learned Judge.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. Muddamal to be disposed of in terms of direction given by the learned Judge in the impugned judgment.

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